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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 11.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF MARY HATCH RIGGS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CLARENCE B. RIGGS, DECEASED, IN BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONER.

BENJAMIN S. CATCHINGS,

Of Counsel for Petitioner.

Holland House,

New York.

(Consultation Office.)

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STATEMENT OF CASE.

This cause comes on upon original petition for writ of prohibition by reason of the exercise of jurisdiction of the District Court of the Southern District of New York over New York Tunnel Company, a corporation principally engaged in the business of constructing a tunnel under East River between Brooklyn and New York in bankruptcy, thereby depriving complainant, Mary Hatch Riggs, Admx., a Tort creditor, of her share in the estate of the insolvent corporation.

The bill sets forth at length the equities surrounding the efforts of petitioner in lower Courts and sufficiently shows her

freedom from Laches and her equitable standing before this Court.

In considering the defence which will probably be made on the question of intervening rights, a close reading of the contract between T. T. Wells and the Rapid Transit Subway Construction Company will disclose that Judge C. M. Hough was wholly in error in stating that the Trustee had borrowed one million dollars. (Return folio 344, 345.) It will be noted that the trustee is not bound to repay any money paid by the Rapid Transit Company in completing the construction work. (Return folio 271-273, 274.)

The case presents the following points:

1st. The District Court is without jurisdiction over the Tunnel Company. 2d. If the District Court has jurisdiction, the act is unconstitutional in that it deprives the unliquidated Tort creditor of property without due process of law. 3d. Complainant is without relief other than by this equitable petition and the Supreme Court has jurisdiction thereof. 4th. The equities demand the relief prayed for. 5th. The prayer should be granted.

I.

The District Court is Without Jurisdiction Over the New York Tunnel Company.

New York Tunnel Company is a corporation (Folio 6 of the petition).

It was not a corporation principally engaged in trading, printing, publishing, mining, manufacturing or a mercantile pursuit (petition folio 7), and this was apparent upon the face of the petition in bankruptcy (petition folio 6, Return folio 26, 38).

The statute is strictly construed and jurisdiction thereunder is derived from the statute only.

New York vs. New Jersey Ice Lines, C. C. A., 2d Circuit, from Sou. Dist., N. Y., 147 Fed., 214, Wallace, Lacombe & Coxe, C. J. S.

Section 4b, enumerating classes of corporations subject to the act, is to be strictly construed and includes only such corporations as are clearly within the enumeration.

Mr. Justice Lacombe says:

"The Bankruptcy Act of 1867 covered all moneyed business or commercial corporations and joint stock companies. This was a very comprehensive clause, and when Congress in a later act undertakes, in place of it, to give a specific enumeration of the particular kinds of business in which corporations must be 'principally engaged' in order to bring them within the terms of the act, it is to be assumed that the words of such enumeration were used ex industria to restrict the provisions of the statute to such corporations only as are clearly within the enumeration."

104 F., 67, Chicago Joplin Lead & Zinc Co. (By Phillips D. J. W. D. Missouri, October 10, 1900.)

"The Bankrupt Act (Sec. 43) limits the corporations which may be put into bankruptcy to such as are 'engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits.' . . . The burden of proof rests upon the petitioners," etc.

140 Fed., 840 Butt, et al. vs. C. F. McNichol Const. C. (Circuit Court of Appeals, Fourth Circuit, Nov. 9, 1905).

Before Pritchard, Circuit Judge, and Morris and Purnell, District Judges.

"Hughes on Federal Procedure, a work which has recently been published, in discussing this question, on page 86, says:

"As to the corporations against whom involuntary proceedings may be taken, the policy of the present law is very different from that of the Act of March 2, 1867. That act allowed

the proceeding against all moneyed, business and commercial corporations and joint stock companies. The language of the present act, as seen above, is entirely different, and therefore the decisions construing the old act must be cautiously used in construing the present one. The intent of Congress was evidently to limit very largely the corporations against whom such proceedings can be taken, probably for the reason that other remedies for the liquidation of insolvent corporations are abundant, and the further reason that a bankrupt law is not as necessary to a corporation as to an individual. In view of this patent intent of Congress to limit the range of the Bankrupt Act as to corporations, it would seem the duty of the courts to construe the language of the act strictly in this respect, though this has not always been done. In re New York Water Company (D. C.), 98 Fed., 711. The appellee had no principal place of business, nor was it engaged in manufacturing bridges to be placed upon the market, as such, but was simply engaged in constructing bridges, wharves and bulkheads on the premises of those who employed it and driving piles for foundations for building under contract.

. . . "This class of work is easily distinguished from that of large establishments and shops which are maintained by and operated principally for the purpose of manufacturing the different structural parts of bridges, etc. The parts thus completed are the finished product, and it is only necessary to transport the same to the place where the bridge is to be erected and place them together in order to complete the structure. In such instances the raw material is by hand or machinery transformed into the finished product, and persons thus engaged are as essentially manufacturers as are those who manufacture saw mills, steam engines, mowers, reapers, and other useful implements, which are usually constructed so as to enable the manufacturers to ship the different parts to the point of delivery, where they are placed together, thus completing the machines, the manufacture of which is the principal business of the parties thus engaged in placing such articles on the market. The finished product is the result of the process of manufacture, and the courts have universally held that persons thus engaged are manufacturers.

"It is contended by the petition that there is no reason why a construction company should not be subject to the provisions of the bankrupt law; that, if the law is not so construed as to include this class of corporations, great injustice may be

done by permitting such companies to prefer certain of their creditors to the exclusion of others. While such may be true, the court is not in a position to remedy the evil of which the petitions complain, inasmuch as it has no power to alter, amend or change the existing law. We can only apply the law to such cases as are contemplated by that statute. Congress is the only body that has the power to enact laws for the purpose of adjusting any inequalities that may exist, and until such action by that body can be secured the courts are powerless to interfere. In re New York & W. Water Company, 98 Fed., 711, District Court S. D., New York, January 8, 1900. The Act of 1898 is much more limited in its application to corporations than the Act of 1867. By the latter act it was declared (Section 5122, Rev. St.) to apply all moneyed, business or commercial corporations and joint stock companies'. The present act is restricted to corporations 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits'.

"The intention of Congress greatly to restrict the application of the present act appears manifest, not only from the report of the Congressional Conference Committee upon this point."

Murphy vs. Utter, 186 U. S., 111.

"Every word or clause used in a statute is presumed to have a meaning of its own independent of other clauses."

"Remington on Bankruptcy," p. 80. "Jurisdiction of the District Court over corporations is more limited by the act of 1898 than the act of 1867."

The petition in bankruptcy (petition folio 6. Return page 9) alleged the corporation to be "Engaged in the business of building and contracting." Building companies and contracting companies are not within Section 4 B of the Statute, and the filing of such a petition did not bring the Tunnel Company within the limited jurisdiction of the District Court, and all action thereon was void.

Kingston Realty Co., 160 Fed., 445 C. C. A., 2nd Circuit, page 446, Judge Noyes says:

"Is the building of houses manufacturing? It strains the term to so use it—goods, wares and merchandise are manu-

factured; houses are constructed. Houses are real estate. They are not articles of commerce, and 'manufacturing' does not apply to their construction. The distinction would seem to run along the line of those articles which are more or less fixed in place and not ordinarily the subjects of bargain and sale as articles of commerce as distinguished from those that are movable and ordinarily regarded as subjects of sale and manual transfer—articles of trade in the common course of mercantile business," 127 Fed., 99; 158 Fed., 593.

New York Tunnel Co., 165 F. 284.

"At the time the adjudication was made in this case, building companies had been held in two districts of this circuit to be within the Act; In re Niagara Contracting Co., 127 F. R. 782; In re Rutland Realty Co., 157 F. R. 296; In re Church Construction Co., 157 F. R. 298. We have since decided in the Matter of the Kingston Realty Co., 160 F. R. 447, that they are not subjects of adjudication."

Haul & Kaul Co. vs. Friday, et al. (3rd Circuit Court of Appeals, December 27, 1907).

(Judge Gray—headnote) a corporation, the principal business of which is the building and construction of concrete arches, bridges, buildings, walls and other structures in situ, is not one engaged principally in manufacturing, and is not subject to adjudication as a bankrupt.

"Remington on Bankruptcy," p. 81. "The common and popular meaning given to classes of corporations must be followed."

"Remington on Bankruptcy," p. 84. "Corporations must be principally engaged in the class of business pleaded."

"Remington on Bankruptcy," p. 90. "Building and construction companies are not subject to bankruptcy. They are not traders because they do not buy and sell, nor are they manufacturers because they do not make a commodity. They simply construct."

In re Mannering vs. Evans, 156 Fed., 109.

"In the present case the petition in bankruptcy was defective on its face . . . the filing of a petition in bankruptcy is

notice to all the world . . . if on its face it appears to be in proper form, creditors who do not join in it are entitled to rely upon it as a good petition . . . but to extend that rule to a case in which the petition shows on its face that the requisite number of creditors have not joined in it—a defect every creditor is bound to observe—is equivalent to adjudging a petition valid in which the acts of bankruptcy charged were committed more than four months before the filing of the petition."

In re Elmira Steel Co., 109 Fed., 456.

Headnote. "A petition in involuntary bankruptcy against a corporation must allege that such corporation is one of the class which may be adjudged bankrupt under Section 4 b. A petition which contains no allegation as to the business in which the corporation is engaged confers no jurisdiction upon the Court, and all proceedings thereon, including an adjudication made without proof, except the admissions made by the corporation, are void."

Page 479. "But the Bankruptcy Act does not except certain corporations from its involuntary bankruptcy, but from among all corporations selects a few which may be so subjected . . . jurisdictional facts must be alleged . . . so that it has been held that to sustain proceedings in involuntary bankruptcy the petition must allege and the proof show that the corporation is authorized by its charter and is, or was, in fact, principally engaged in the business named in the act in declaring what corporations may be adjudged involuntary bankrupts. (Cites 104 F., 67, 101 Fed., 42.) The petition contained no allegation as to the character of the corporation against which it was directed . . . the conclusion is irresistible that this petition conferred no jurisdiction whatever upon the . . . district court, and that all proceedings therein, including the adjudication made upon that petition and all subsequent proceedings which had been or may be had thereunder, including the appointment of receivers, the appointment of a Trustee, if any, and his title are absolutely void as against any person, who, anywhere and at any time may raise the objection." Vide quoque, 130 Fed., 981; 129 Fed., 201; 130 Fed., 957; 128 F., 631.

In re Stein, 130 Fed., 377.

"A petition in involuntary bankruptcy which does not show upon its face that the claims of petitioners amount to more than $500 does not give the Court jurisdiction, and it has no power to allow an amendment joining other creditors having claims sufficient to make up the requisite amount."

In re Rosenberg, 116 Fed., 402.

"Where a proceeding before a referee . . . was dismissed for want of jurisdiction, the entire proceedings necessarily become null."

Simultaneously with the filing of the petition in bankruptcy, a petition for the appointment of a receiver was filed (petition folio 7. Return folio 4) which alleged the New York Tunnel Company "has a contract for the construction of the tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the Boroughs of Manhattan and Brooklyn." In appointing the Receiver, Honorable George C. Holt, District Judge, authorized the Receiver "in his discretion to continue the business of such bankrupt in constructing the tunnel now under construction, running from Battery Park, in the Borough of Manhattan, under the East River to the Borough of Brooklyn." (Petition folio 8. Return folio 38.) On May 28th following, Mr. Wells, receiver, alleged and proved in a petition for a consulting engineer that "The principal business ness of the said alleged bankrupt is the construction of the tunnel between Brooklyn and New York. (Petition folio 10.) Thereupon, still prior to the adjudication, Judge Holt decreed "It satisfactorily appears that the receiver is conducting the business of said New York Tunnel Company, and requires the advice of a competent engineer skilled in submarine tunnel construction." (Petition folio 12.)

Thereafter, on May 29, 1907, upon consent of the Tunnel

Company, and without a trial, an alleged adjudication was made (Return folio 39, 44). Prior to the adjudication the record affirmatively showed that the Court was without jurisdiction and the adjudication and all proceedings thereon were void.

148 Fed., 832. In re T. E. Hill Co., C. C. A., 7th Circuit, October 25, 1906. Before Grosscup, Baker & Seaman.

A Construction Co. "The proof is undisputed that the sole business of the appellee from incorporation was the construction, under contract of piers and abutments, made of concrete, for railroad bridges, including the work of clearing the foundation, under contract of piers and abutments, made of concrete, for the work. In other words, it was of the class commonly known as 'construction companies' and not within the usual definition of a manufacturer—namely, one 'engaged in manufacturing for sale of articles of commerce.'"

Portland Cement Co., 156 Fed., 83, page 85.

The power to manufacture implies of necessity the power to sell.

"Remington on Bankruptcy," page 84.

"Manufacturing is to be distinguished from merely constructing, and a corporation engaged in structural work is not engaged in manufacturing."

"Remington on Bankruptcy," page 51.

"As is later noted, the record of adjudication imports jurisdiction where jurisdictional findings are merely omitted, and makes the adjudication impervious to attack; but if the record affirmatively shows the debtor did not belong to the classes subject to bankruptcy it would without question be absolutely void on its face." (Reviewing First National Case, 18 A. B. R., 271.) (Also see Elmira Steel Co., 109 Federal.)

In re New York Tunnel Co., 165 F., 284. (Return folio 401.) If a petition for adjudication were made by only two creditors, the law requiring three, there would be a judisdictional defect

on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be $500, as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void.

II.

If the District Court Has Jurisdiction the Bankruptcy Act Is Unconstitutional in that it Deprives the Unliquidated Tort Creditor of Property Without Due Process of Law.

Judgments arising ex delicto obtained prior to the adjudication in bankruptcy are provable in bankruptcy (Section 63 A).

In New York Tort Creditors having unliquidated claims may attach the property of a corporation (see Code of Civil Procedure, Sec. 635). The liability to the tort claimant accrues upon the injury, not upon its determination. Such claims, though not reduced to judgment, are a class of property, especially in death cases, as is that of complainant Riggs. In death by wrongful act the statute prescribes how such property is to be distributed when recovered. In this case the entire property of the Tunnel Company was seized in bankruptcy without notice to tort creditors, an adjudication was made within one week in a summary manner and the tort creditors are held to have no standing in bankruptcy and are prohibited from asserting any rights or claim to the property in the possion of a "Court of Equity". Such practices, if proper under the statute, do not amount to due process of law and the act is unconstitutional.

"Remington on Bankruptcy," Section 23: "Celerity of procedure intended but not so summary as to deprive of right to defend." (See Lackman vs. Lange, 132 Fed., and citations).

Section 20: "Bankruptcy proceedings are a branch of equity jurisprudence."

Mason vs. Eldred, 6 Wall., 237. The principle is as old as the law and of universal justice that no one shall be bound until he has had his day in court.

In re New York Tunnel Co., 165 F., 284. (Return folio 400.)

It is objected by the contract creditors and by the trustee, among other things, that the Borne-Scrymser Company has no standing because, having previously filed its claim in bankruptcy, it has acquiesced in the adjudication. In re Worsham, 142 F. R., 121, and that the tort claimants have no standing because their claims are not provable in bankruptcy. (In re New York Tunnel Co., 159 F. R., 688. We think these objections are good."

(It is a high degree of judicial interpretation which prevents a contract creditor who has proven a claim from seeking to vacate an inequitable adjudication in bankruptcy and at the same time denies to those who have not or cannot prove their claims in bankruptcy the right to even be heard in opposition thereto.)

In re New York Tunnel Co., 165 F., 284. (Return folio 403, 404.)

(The petitioners and appellants have proceeded throughout under the Bankruptcy Act. But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the court as amici curiae to a want of jurisdiction of the subject-matter appearing on the face of the record. In re Columbia Real Estate Co., 101 F. R., 965. It must be admitted that tort claimants who see the property of a person against whom they make claim seized and administered in bankruptcy to their own exclusion for the benefit of contract creditors have an interest which should be protected and are in bad case if the law affords no remedy.)

III.

Complainant is Without Relief Other Than by This Petition, and the Supreme Court Has Jurisdiction Thereof.

The complainant has not been guilty of laches (see petition folio 19-53) and has exhausted every possible remedy without relief (petition folio 19-53, 57, 58).

This proceeding is justified by the practice of this Court.

Ex parte Bradley, 7 Wall 364.

Virginia vs. Reves, 100 U. S. 313.

Virginia vs. Paul, 148 U. S. 107.

Kentucky vs. Powers, 201 U. S. 1.

Ex parte Wisner, 203 U. S. 1449.

In re New York City Railway.

In this connection counsel cites Section 109, Pomeroy's Principles of Equity:

"Equitable remedies on the other hand are distinguished by their flexibility, their unlimited variety, their adaptibility to circumstances and the natural rules which govern their use. There is, in fact, no lack of variety and application. The court of equity has the power of devising its remedy and establishing it so as to fit the changing circumstances of every case and the complex relations of all the parties."

The power of the Supreme Court of the United States to issue writs of prohibition or mandamus is found in Revised Statutes, Section 688.

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States where a State, or an ambassador, or other public minister, or a consul or vice-consul, is a party."

Revised Statutes, Section 716, which is sometimes referred to in the cases on mandamus, provides that:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law."

The general principles governing the issue of the writ may be stated as follows:

The writ will issue from this court to a subordinate court of the United States:

(a) When the lower court has jurisdiction of a case but refuses to hear and decide it (ex parte Schollenberger, 96 U. S., 369; In re Connaway, 17 U. S. 421), unless its right to issue writ in such a case has been expressly or impliedly taken away by statute (In re Pennsylvania Co., 137 U. S., 451.

The mandate will be to take jurisdiction and to hear and decide.

(b) When the lower court, having heard the case, refuses to enter a judgment or decree, or refuses to perform some purely ministerial act, like signing a bill of exceptions (Life and Fire Ins. Co. vs. Wilson's Heirs, 8 Peters, 291).

The mandate will be to enter the judgment or decree that to the lower court seems proper, or to perform the ministerial act.

(c) When the lower court, after an appeal to this court, has through misconstruction, mistake or otherwise failed to execute the directions of this court according to what appears to this court to be the manifest meaning of such directions (Gaines vs. Rugg, 148 U. S., 228; In re Potts, 166 U. S., 263).

The mandate will be to execute those directions as construed by this court.

(d) When the lower court on the face of the record has no power to act (Ex parte Bradley, 7 Wall, 364; Virginia v. Rives, 100 U. S., 313; Virginia v. Paul, 148 U. S., 107; Kentucky v. Powers, 201 U. S., 1; Ex parte Wisner, 203 U. S., 449).

The mandate will be to cease to act and to turn over to the proper court or person whatever it has taken possession of in an attempt to exercise jurisdiction.

IV.

The Equities Demand the Relief Prayed For.

The trustees in bankruptcy having failed or refused to bring an action against the stockholders of the Tunnel Company to recover nearly $200,000 paid in dividends on a total capital of $250,000 prior to the completion of the Tunnel Company's only undertaking from money advanced to carry on the work, complainant Riggs as a judgment creditor is prosecuting such an action for the benefit of all creditors and the trustee in bankruptcy, without contributing to the expense of the action, has asserted a claim to all benefits derived therefrom to the exclusion of complainant (petition folio 56).

No intervening rights of importance if any have intervened without notice of the attack upon the jurisdiction (petition folio 53-55).

For all acts of T. Tileston Wells, as defacto Receiver and Trustee, the New York Tunnel Company is liable by having brought about his appointment and by having consented to the adjudication. (Return folio 39.)

Anderson on Receivers, page 414:

"Where through the collusion of a railroad company a receiver is appointed over its property, who takes possession of

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and operates it, he will be considered as the representative and the mere agent of the company, and for his acts it will be liable. It was said in the first case cited that if the appointment be made collusively for the benefit of the company and with its consent, for the purpose of placing its property beyond the reach of some classes of its creditors, then the receiver will be the servant or agent of the Company, for whose acts it will be responsible as though he had been appointed by its stockholders or directors." (Cites Texas & Pacific Ry. Co. v. Johnson, 76 Tex. 421, 13 S. W. R. 463, 18 Am. St. R. 60; Texas & Pacific Ry. Co. v. Gay, 86 Tex. 571, 26 S. W. R. 599, 25 L. R. A., 52; San Antonio & Arkansas Pass Ry. Co. v. Adams, 11 Tex. Civ. App. 198, 32 S. W. R., 733.)

V.

In Consideration of the Equitable Condition Shown by the Petition and the Record the Relief Prayed for Should be Granted.

Respectfully submitted,

BENJAMIN S. CATCHINGS,

Solicitor for Petitioner.

April 12, 1909.